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IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1968

No. ~~449~~

ROBERT M. BRAKE,

Petitioner,

vs.

DON SHOEMAKER, THE MIAMI HERALD PUBLISHING COMPANY, a Florida corporation and FRED SHERMAN,

Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF FLORIDA AND THE COURT OF APPEALS THIRD DISTRICT, STATE OF FLORIDA

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PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF FLORIDA AND THE COURT OF APPEALS THIRD DISTRICT, STATE OF FLORIDA

The petitioner prays that a Writ of Certiorari issue to review the Judgment of the Supreme Court of Florida entered in the above case on July 8th, 1968, and of the District Court of Appeal of Florida, Third District, entered March 19th, 1968, in the above case.

OPINIONS BELOW

The opinion of the Supreme Court of Florida has not yet been reported. The opinion of the District Court of Appeal of Florida, Third District, is reported at 208 So.2d 107.

JURISDICTION

The jurisdiction of this Court is invoked under 28 U.S.C. 1257(3) and Rule 19 of the Supreme Court Rules in that the Respondents specially set up, in their Motion to Dismiss Plaintiff's Complaint, their rights, privileges or immunities from suit for libel of a public figure under the First Amendment to the Constitution of the United States; and the question of the sufficiency of the allegations of actual malice in Plaintiff's Complaint was decided by the Courts below in a way probably not in accord with the applicable decisions of this Court.

QUESTIONS PRESENTED:

Petitioner was Plaintiff in the trial Court and filed a Complaint in three Counts against the Respondents who were Defendants below. Each Count alleged the publication of a separate libel. At the time of the publication of two of the libels Petitioner was a duly elected public official in Dade County, Florida. At the time of the publication of the third libel Plaintiff was an active participant in a public controversy and was admittedly a public figure as defined by this Court in **Curtis Publishing Company v. Butts**, 388 U.S. 130, 87 S.Ct. 1975, 18 L.Ed. 2d 1094. Although the Complaint as to all three Counts was originally filed before the decision in **New York Times Co. v. Sullivan**, 376 U.S. 254, 84 S.Ct. 710, 11 L.Ed. 2d 686, all three Counts separately alleged that

> "... Defendants acted maliciously, recklessly and in bad faith ..."

and alleged that Defendants knew the defamations were untrue when they were published. Each Count set forth additional facts to support this allegation.

Thereafter both parties moved for Summary Judgment as to liability and supported and opposed these Motions by evidentiary matter. After a hearing but before a ruling thereon was entered the pleadings were amended as to Count III. Defendants filed a new Motion to Dismiss all three counts. Thereupon the trial court entered a Final Judgment denying all Motions for Summary Judgment and granting Defendants' Motion to Dismiss Plaintiff's Complaint. Thereafter this Order was affirmed by the District Court of Appeal of Florida, Third District, "on authority of **New York Times Co. vs. Sullivan,** 376 U.S. 254, 84 S.Ct. 710, 11 L.Ed. 2d 686. See also **Curtis Publishing Company vs. Butts,** 388 U.S. 130, 87 S.Ct. 1975, 18 L.Ed. 2d 1094." The Supreme Court of Florida refused certiorari on July 8th, 1968. The questions presented are:

1. Are the general allegations of malice in Plaintiff's Complaint sufficient to satisfy such pleading technicalities as may be required by this Court under the authority of **New York Times Co. vs. Sullivan,** 376 U.S. 254, 84 S.Ct. 710, 11 L.Ed. 2d 686.

2. Are the expanded allegations of malice in Plaintiff's Complaint sufficient to satisfy such pleading technicalities as may be required by this Court under the authority of **New York Times Co. vs. Sullivan,** 376 U.S. 254, 84 S.Ct. 710, 11 L.Ed. 2d 686.

CONSTITUTIONAL PROVISIONS AND RULES INVOLVED

The pertinent portion of the Constitutional provisions and Rules involved are as follows:

1. The First Amendment to the United States Constitution.

2. Florida Rules of Civil Procedure Rule 1.110:

> "(a) Forms of Pleadings. Forms of action and technical forms for seeking relief and of pleas, pleadings or motions are abolished.
>
> (b) Claims for Relief. A pleading which sets forth a claim for relief, whether an original claim, counterclaim, cross-claim or third party claim must state a cause of action and shall contain (1) a short and plain statement of the grounds upon which the court's jurisdiction depends, unless the court already has jurisdiction and the claim needs no new grounds of jurisdiction to support it, (2) a short and plain statement of the ultimate facts showing that the pleader is entitled to relief and (3) a demand for judgment for the relief to which he deems himself entitled. Relief in the alternative or of several different types may be demanded. Every complaint shall be considered to pray for general relief . . .

> (f) Separate Statements. All averments of claim or defense shall be made in consecutively numbered paragraphs, the contents of each of which shall be limited as far as practicable to a statement of a single set of circumstances and a paragraph may be referred to by number in all subsequent pleadings. Each claim founded upon a separate transaction or occurrence and each defense other than denials shall be stated in a separate count or defense when a separation facilitates the clear presentation of the matters set forth . . ."

This is an adaptation of Federal Rule 8(a) and 54(c) of the Federal Rules of Civil Procedure.

STATEMENT

The Order of the trial court sought to be reviewed is a Judgment dismissing Plaintiff's Complaint without leave to amend. Defendants' Motion to Dismiss raised the constitutional question of the sufficiency of the Complaint to allege malice as required by the decisions of this Honorable Court interpreting the First Amendment to the United States Constitution. The trial court held that the allegations of the Complaint were insufficient to allege actual malice.

This cause was appealed to the District Court of Appeal of Florida, Third District, which affirmed the Judgment of the trial court on the authority of **New York Times Co. vs. Sullivan**, 376 U.S. 254, 84 S.Ct. 710, 11 L.Ed. 2 686 and **Curtis Publishing Company vs. Butts**, 388 U.S. 130, 87 S.Ct. 1975, 18 L.Ed. 2d 1094. As provided by Article

V, Section 4(2) of the Constitution of the State of Florida a Petition for Certiorari was filed with the Florida Supreme Court but that Court declined to take jurisdiction of the cause.

As amended, the Complaint alleged in three counts that three separate matters published in The Miami Herald newspaper by Defendant were false and defamatory as to Plaintiff and were made maliciously, recklessly, in bad faith, and for the purpose of causing Plaintiff to suffer embarassment, financial loss and other harm. Each count further alleges that the Defendants knew that the published statements were untrue at and before the times they were published.

1. Count I alleged that in August, 1962, Plaintiff was a newly elected member of the Dade County Commission and the Defendant The Miami Herald Publishing Company was a Florida corporation publishing a newspaper in Miami, Florida, having a daily and Sunday circulation in excess of 350,000; and that the Defendant Don Shoemaker was the editor of the newspaper with final responsibility for the anonymous editorials and editorial cartoons in the newspaper.

On Sunday August 26th, 1962 Defendants printed a front page editorial in the City Edition of The Miami Herald criticizing Plaintiff and four others for allegedly forcing the resignation of the County Manager. Plaintiff alleged the language was defamatory as stating and implying that Plaintiff was engaged in conduct which was unlawful or immoral or of doubtful legality or morality and that Plaintiff lacked maturity.

> In addition to alleging that the Defendants acted " . . . maliciously, recklessly and in bad faith and for the purpose of causing Plaintiff to suffer embarrassment and financial loss . . . " [A, p. 2]

the Complaint alleged that the Defendants knew the allegations of the editorial were untrue in that on the day preceding publication of the editorial the newspaper had run a story in which a Miami Herald reporter described a luncheon attended by the Reporter at which the resolution complained of in the editorial was discussed. This article showed clearly that Plaintiff did not participate in the drafting of the resolution and in fact attempted to persuade the author of the resolution to withdraw it. [A, p. 2] Plaintiff also alleged that he had requested a retraction under Chapter 770 Florida Statutes but no retraction was published.

2. Count II alleged that an editorial cartoon published on August 29th, 1962 depicted Plaintiff and others as small boys attempting to steal a pie from a window sill. The implication of said cartoon was alleged to be that Plaintiff was attempting to steal from the people of Dade County. The Complaint alleged

> "That Defendants acted maliciously, recklessly and in bad faith and for the sole purpose of causing Plaintiff to suffer embarassment and financial loss and to force Plaintiff to lose his position as County Commissioner; and to use Plaintiff's said loss as an example to other local political figures of the reprisal of which the Defendant would exact if any of them dared to act in opposition of Defendant's wishes." [A, p. 4]

The Complaint further alleged

> "That Defendants knew that the imputations of said cartoon were untrue as to Plaintiff and said knowledge was reflected in the news reports and news columns of Defendants' newspaper on the days immediately preceding the publishing of said cartoon." [A, p. 4]

Plaintiff also alleged that he requested a retraction as required by Florida Statutes Chapter 770 but that no retraction was published.

3. Count III alleged that after Plaintiff left public office a third editorial defamatory of Plaintiff was published by Defendants in the Miami Herald on Tuesday, August 25th, 1964. This editorial criticized Plaintiff as a lawyer-draftsman of two proposed amendments to the Metropolitan Dade County Charter and as one of the leaders of a group which sought to obtain an election on the amendments through the initiative process authorized by the Charter.

One of the Charter Amendments required certain reforms to be made in the office of the Tax Assessor of Dade County to correct the scandalous inequities in assessments which were brought to light as the result of the doubling of Dade County's tax roll following the decision of **McNayr vs. State ex rel DuPont Plaza Center, 166 So.2d 142.** The editorial stated

> "Bob Brake is a lawyer and he should know the law . . . The anti-Metro petitions now being circulated promise that the state law on the

assessment of real estate will not be enforced. "Could anything be more dishonest?" [A, p. 17-18]

The editorial also asked the rhetorical question

> "Where was Bob Brake and what was he doing as a Metro Commissioner to make Dade County comply with the Florida assessment law?" [A, p. 17]

Plaintiff alleged that the first statement was false and that nothing in the Petitions or any statement made by or under the control of Plaintiff promised that state law would not be obeyed. Plaintiff alleged that the second statement implied that he had done nothing as a commissioner to obtain an equalized tax roll and that such implication was false. Plaintiff alleged certain steps he had taken as a commissioner to obtain an equalized tax roll which demonstrated the falsity of the libel.

To show malice as to the first statement Plaintiff alleged that Defendants had studied copies of the Charter Amendment and Plaintiff's statement before publishing the libel and that they knew the statements were false before they were published. [A, p. 13, 14]

As an alternative allegation of malice, Plaintiff alleged that the defamatory statements were made with a "reckless disregard of truth". To bolster this allegation Plaintiff alleged that Defendants

A. failed to contact him or any of his associates to determine the contents of the amendments.

B. did not read the amendments or press releases on which the editorial was based.

C. did not compare the report of a professional appraiser's group which had made recommendations for reforms of the tax assessor's office with the amendments, which would write those reforms into the charter, despite having published a prior news story stating that the report's recommendations were the source of the amendments. [A, p. 17]

To show malice as to the second statement Plaintiff alleged that Defendants had reporters at each session of the County Commission which Plaintiff had attended and were thus familiar with his efforts to obtain an equalized tax roll. [A, p. 13, 14]

Finally, Plaintiff added a general allegation as to malice which stated that

> "Defendants acted maliciously, recklessly and in bad faith and for the purpose of causing embarassment and humiliation to Plaintiff in his capacity as a lawyer and private citizen of Dade County . . . " [A, p. 14, 15]

The Complaint, less certain Exhibits not essential to the decision of this cause, are printed in the Appendix to this Petition. The Complaint and all Exhibits as well as the Motion to Dismiss and the Orders of the various courts are made a part of the Record filed with this Petition.

The Defendants filed Motions to Dismiss the Complaint which were heard and denied. Thereafter, Defendants filed an Answer and moved for Summary Judgment

and Plaintiff moved for Summary Judgment as to liability. These Motions were supported and opposed by evidentiary matter by both parties. After the hearing but prior to a ruling thereon only Count III of the pleadings was amended at the suggestion of the court. Defendants thereupon filed a second Motion to Dismiss the entire Complaint. [A, p. 19-20] After a further hearing the trial court entered an Order dismissing all three Counts of the Complaint and denying the various Motions for Summary Judgment. [A, p. 18-19] Florida's Third District Court of Appeal and Supreme Court affirmed The Judgment [A, p. 21-22]

REASONS FOR GRANTING THE WRIT

The decisions below should be reviewed because the State courts have decided the Federal question of the sufficiency of a Complaint to allege malice in a way probably not in accord with the applicable decisions of this Court. In addition, this question has not been decided by this Court since the rendition of the opinion in the case of **New York Times Co. vs. Sullivan**, 376 U.S. 254, 84 S.Ct. 710, 11 L.Ed.2d 686 and the law thereon is not clear. In either event this Court should grant review.

Although none of the courts below gave any rationale for their decisions, the District Court of Appeal of Florida, Third District, cited the cases of **New York Times Co. vs. Sullivan**, 376 U.S. 254, 84 S.Ct. 710, 11 L.Ed.2d 686 and **Curtis Publishing Co. vs. Butts**, 388 U.S. 130, 87 S.Ct. 1975, 18 L.Ed.2d 1094, as authority for its decision. [A, p. 22] These cases dealt with the legal standard of malice applicable to cases concerning a public officeholder or public figure and with the quantum of evidentiary proof

necessary to show such malice. They did not treat in any manner the question of the sufficiency of a Complaint for libel. However, their citation by the Court below makes it apparent that its decision was based on the question of malice.

First Question: Is a general allegation of malice sufficient?

Rule 1.110(b) Florida Rules of Civil Procedure, was taken almost word for word from Rule 8(a) of the Federal Rules of Civil Procedure. In addition Florida Rule 1.110(a) abolished technical forms for seeking relief. The function of a Complaint is held to be that of informing the Defendant and the Court of the nature of Plaintiff's claim in a manner sufficiently clear and direct to make it unnecessary for the Defendant or the Court to seek further allegations to determine the nature of the claim (**Parker vs. Panama City**, 1963, Fla. App., 151 So.2d 469).

Even before these Rules were adopted Florida Appellate Courts as well as this Court had occasion to pass upon allegations of malice in libel actions in connection with requests for punitive damages. In **White vs. Nichols**, 44 U.S. 266, 11 L.Ed. 591, the United States Supreme Court said

> "(a)ssuming the publication declared on as a libel to be one which would be prima facie privileged the circumstances which would render it illegal, in other words, the malice which prompted it, must be expressly averred. Upon this point the court will observe, in the first place, that in cases like the one supposed in

argument, they hold, that in describing the act complained of, the word 'maliciously' is not indispensable to characterize it; they think that the law is satisfied with words of equivalent power and import: Thus, for instance, the word 'falsely' has been held to be sufficiently expressive of a malicious intent, as will be seen in the authorities cited . . . But the declaration in each of these cases charges the defendants, in terms, with maliciously and wickedly intending to injure the plaintiff in his character, and thereby to effect his removal, from office, and the appointment of one of the defendants in his stead; and with that view, with having falsely, wickedly and maliciously composed and published and having caused to be composed and published a false, malicious and defamatory libel concerning the Plaintiff, both as a citizen and an officer. The averments in these declarations appear to the court, in point of fact, to be full up to the requirement insisted on, and to leave no room for the criticism attempted with respect to them."

In **Stewart vs. Codrington**, 1908, 54 Fla. 327, 45 So. 809, at 812, the Florida Supreme Court said:

"The declaration, in substance, avers that the Defendants, conspiring and maliciously intending to injure the Plaintiff in his profession and as judge, falsely, wickedly, and maliciously did publish and cause, and procure to be published, of and concerning the Plaintiff, to diverse good and worthy citizens of the State of Florida, in

> etc., the libelous matters contained in the several counts. These allegations, if true, we think deprives the alleged libelous matter of the character of privileged publications or qualifiedly privileged publications under the doctrine laid down in **Coogler vs. Rhodes**, 38 Fla. 240, 21 S. 109, 56 Am.St.Rep. 170, for it is there held what would otherwise be a qualifiedly privileged communcation is not so if the publisher is actuated by malice, and in this case there is the positive averment of malice. See **Abraham vs. Baldwin**, 52 Fla. 151, 42 So. 591, 10 L.R.A. (N.S.) 1051." (45 So. at 812)

The Court thus approved the simple words

"maliciously intending to injure the Plaintiff"

and

"falsely, wickedly and maliciously did publish"

as sufficient wording to sustain an allegation of malice to take the libel out of the qualified privilege category.

In the case of **Caldwell vs. Personal Finance Co.**, 46 So.2d 726, the Florida Supreme Court quoted the Complaint as setting forth that the libelous statement

> "... was false and was known by the Defendant to be false at the time said statement was made, and said Defendant made said statement maliciously and with the intent of preventing Plaintiff from procuring credit ... that the Defendant wilfully, wantonly, and maliciously slandered Plaintiff in his credit and reputation for the purpose of extorting from Plaintiff the payment of the sum of money ..." (46 So.2d at 727)

The Florida Supreme Court said of this pleading:

"If, as it is alleged, the appellee knew at the time of making its statement to Aetna Finance Company that said statement was false the communication should be held in law to be malicious unless appellee can establish its verity or make a clear showing that it had probable cause to believe it to be true. Since the declaration alleges that appellee knew that its statement to Aetna Finance Company was false it is unnecessary for the appellant to allege that the appellee did not have probable cause to believe the statement to be true . . .

"It is our conclusion that the amended declaration does state a cause of action and the demurrer thereto should have been overruled." (46 So.2d at 727)

In the case of **Hevey vs News Journal Corporation,** 128 So.2d 543, the Florida District Court of Appeal, Second District, had before it a Final Judgment which dismissed with prejudice a complaint in an action for libel. The Complaint alleged simply

". . . that Defendant maliciously caused to be printed and circulated . . ."

in their two newspapers an article and an editorial

". . . containing certain false, libelous, and defamatory statements of and concerning the Plaintiff . . ."

The Complaint further charged that the Defendant published the defamatory matter "with knowledge" that certain matters of fact were not true. The Court held that the Complaint stated a cause of action for libel against the several Defendants.

The language in the case at bar is much stronger than that found necessary by the courts in these cases. In each Count the Complaint alleged that the Defendants "acted maliciously, recklessly and in bad faith" and included in the first two Counts an additional allegation that it was done for the purpose of causing Plaintiff to suffer embarassment and financial loss and in the third Count was alleged to be for the purpose of causing embarassment and humiliation to Plaintiff in his capacity as a lawyer and private citizen of Dade County.

Since the decisions above, which approved the statements of the ultimate fact of malice made in the complaints in those cases as being sufficent to sustain a complaint against the demurrer, were rendered before the adoption of the present Federal or Florida Rules of Civil Procedure, then **a fortiori** the language in the case at bar should be sufficient to sustain the Complaint against the Motion to Dismiss under the present liberalized Rules of Civil Procedure. This is in line with general procedure throughout the United States. (33 Am.Jur., Libel and Slander, Sec. 242 pp. 221-222)

Neither the case of **New York Times Co. vs. Sullivan,** 376 U.S. 254, 84 S.Ct. 710, 11 L.Ed 2d 686, nor the case of **Curtis Publishing Company vs. Butts,** 388 U.S. 130, 87 S.Ct. 1975, 18 L.Ed. 2d 1094, cited by the District Court in the case at bar, are in conflict with the four cases cited by

Appellant or controlling of the case at bar. Neither case involved the sufficiency of pleadings. Both cases involved appeals from jury verdicts in favor of the Plaintiffs.

In the **New York Times** case this Court stated clearly that the question before it was solely the

> ". . . rule of liability, as applied to an action brought by a public official against critics of his official conduct" (376 U.S. at 268, 84 S.Ct. at 719)

The Court held that the Constitutional guarantees of the First and Fourteenth Amendments to the Federal Constitution

> ". . . require, we think, a federal rule that prohibits a public official from recovering damages for a defamatory falsehood relating to his official conduct unless he proves that the statement was made with 'actual malice'—that is, with knowledge that it was false or with reckless disregard of whether it was false or not." 376 U.S. at 279 and 280, 376 U.S. at 726.

The language clearly shows it is directed at "proof" rather than pleadings.

In the **Curtis Publishing Company** case this Court defined the question before it as

> "... the impact of that decision (**New York Times Co. vs. Sullivan**) on libel actions instituted by persons who are not public officials, but who are

> 'public figures' and involved in issues in which the public has a justified and important interest."

While the **Butts** case extended the rule of the **New York Times** case to persons not public officials, this Court also stated clearly that

> ". . . neither the interests of the publisher nor those of society necessarily preclude a damage award based on improper conduct which creates a false publication." (87 S.Ct. at 1990)

and both the judgment of the Court announced by Mr. Justice Harlan and joined in by Mr. Justices Clark, Stewart and Fortas and the concurring opinion of Mr. Chief Justice Warren found that there was ample evidence from which a jury could have concluded that there was a reckless disregard by the publisher of whether the article was false or not. Under the "notice" theory of pleading a simple allegation of malice should be sufficient even under these decisions.

Second Question: Are The Specific Allegations Of Malice Sufficient?

Even if a stricter standard were to be applied to require detailed allegations of fact in pleadings the decision of the court below is in error in the case at bar:

1. Defendants' knowledge prior to publication that the defamations were false.

The first test in the **New York Times** case is that actual malice consists in publishing a matter "with knowledge that it was false."

Falsity of the charges of Counts I and II as to Plaintiff was alleged to be known to Defendant Don Shoemaker and The Miami Herald prior to the time the editorial and cartoon were published. This general statement was amplified by a factual allegation that Defendants' courthouse reporter was present at a conference during which Plaintiff attempted to persuade Commissioner Long to withdraw his resolution and that fact was published in The Miami Herald prior to the day the editorial was published. Defendants therefore knew that Plaintiff was not part of any group seeking to fire the County Manager or to propose any substitute for the County Manager. [A, p. 2]

As to Count III there can be no doubt that the allegations of the Complaint set forth the fact that the defamation was a "calculated falsehood" of the type denied constitutional protection under the case of **Garrison vs. Louisiana**, 379 U.S. 64, 85 S.Ct. 209, 13 L.Ed. 2d 125. The allegations of Count III showed that the tax assessor amendment to the Dade County Charter, which was the subject of the editorial, embodied verbatim the recommendations of the Hunnicutt Report to the Dade County Commission and that this fact had been reported in The Miami Herald on August 7th, 1964. [A, p. 14] Furthermore, the Count alleges that the Defendants had been given copies of the amendment and Plaintiff's publicity releases and had in fact read these documents. [A, p. 13-14] The Complaint attached a copy of the amendment and a reading of it shows that there is no language in the Petitions which "promised that state law will not be obeyed". In other words, at the time that Defendants wrote and published the defamatory language

"Bob Brake is a lawyer and he should know the law . . . The anti-Metro Petitions now being circulated promise that the state law on assessment of real estate will not be enforced. Could anything be more dishonest?"

thus accusing Plaintiff of giving dishonest legal advice, they knew that the Petitions (which contained the amendment) did not promise that state law would not be obeyed and they knew that their accusation was false. These facts were clearly set forth in the Complaint and clearly meet the test of the New York Times and subsequent cases.

2. Defendants reckless disregard of whether the defamation was false or not.

The omissions of the Defendants, as detailed in Plaintiff's Complaint, almost parallel the omissions of the Saturday Evening Post in the Butts case. In that case the facts showed that Wally Butts, Coach of the University of Georgia football team, had been accused of giving notice of the plays to be used by his team in a forthcoming game with the University of Alabama to the coach of the Alabama team in advance of the game. The accuser claimed to have overheard a telephone conversation between the two coaches through an electronic mixup in telephone equipment.

Although both coaches denied the accusation, the Curtis people failed to take the following steps:

A. They did not interview either coach.

B. They did not view the notes of the accuser.

C. They did not interview witnesses known to have discussed the notes with the accuser on the day they were made.

D. They did not view the game films to determine if the alleged plays had actually been used even though the sports editor of the Post thought it was necessary. In fact, the notes were not of the correct plays actually used in the game.

E. The statements quoted in the article were denied by the persons quoted.

(The above facts were recited in 87 S.Ct. 1975 at 1993 and also in the lower court reports in 225 F.Sup. 917 at 918; 242 F.Sup. 390 at 394 and 351 F.2d 702 at 706).

The allegations in Count III of the Complaint in the case at bar are almost an exact parallel of these facts:

A. The Defendants had read the amendment and knew its content and that it did not promise "state law would not be obeyed". [A, p. 13-14]

B. Neither of the individual Defendants compared the Petitions to the Hunnicutt Report, even though a prior story in The Herald had reported it to be the source of the amendment [A, p. 14]

C. Neither of them read the press releases given out by Plaintiff and his associates although it was the contents of the releases which purportedly triggered the editorial. [A, p. 14]

D. Neither of them bothered to contact Plaintiff or any member of the committee circulating the Petitions to

determine the accuracy of the information which Defendants published. [A, p. 14]

E. Neither of them consulted Plaintiff or its own reporters for the public records or minutes of the Board of County Commissioners of Dade County, Florida to determine Plaintiff's voting record on tax assessment questions. [A, p. 14]

Since the defamation in question was an editorial printed some five (5) days after the newsworthy incident commented on it is obvious that the standards required of a responsible newspaper by the **New York Times Company** case and **Butts** case were not followed.

The case at bar is therefore in conflict with those cases.

So that the Court will not be under the misapprehension that the language is not libelous Petitioner respectfully shows as follows:

1. As to Counts I and II the case of **Hevey vs. News Journal Corporation**, Fla.App 148 So.2d 543, held that an editorial which by clear innuendo and inference stated that the Plaintiff was cheating the taxapyers by hiring incompetents for city jobs was libelous per se. The language complained of in the case at bar accused Plaintiff and four other County Commissioners of proposing to unload all manner of hacks and has-beens on Metro for managerial positions thus inferentially accusing Plaintiff of proposing to cheat the taxpayer by wasting government funds on unqualified employees so appointed.

2. As to Count III the **Hevey** case, supra, and the case of **Hoey et al vs. Fletcher et al**, 39 Fla. 325, 22 So.2d 16 and **Teare vs. Local Union Number 295**, 95 So.2d 79, hold that a publication is libelous per se if it impugned to another conduct, characteristics or a condition incompatible with the proper exercise of his lawful business, trade, profession or office. Plaintiff alleged that to publish of a lawyer that he is a lawyer and should know the law and that a public document prepared by him promises that state law will not be enforced, and then capping the entire libel with the rhetorical question "Could anything be more dishonest?" stated clearly and expressly and by implication that either the lawyer in question was stupid and did not know the law and was therefore incompetent as a lawyer or was dishonest in giving false legal advice. Publication of such a statement in a newspaper of more than one-third of a million in circulation, with no opportunity on the part of the hapless lawyer to rebut such a statement, can effectively destroy the lawyer's legal career.

CONCLUSION

In the case at bar the courts of Florida have thrown the law of libel and slander in Florida into confusion by a misinterpretation of the decisions of this court in New York Times Co. vs. Sullivan, 376 U.S. 254, 84 S.Ct. 710, 11 L.Ed. 2d 686 and Curtis Publishing Company vs. Butts, 388 U.S. 130, 87 S.Ct. 1975, 18 L.Ed. 2d 1094. This confusion can cause great damage if allowed to continue. To clarify the law of pleadings in libel cases; to do justice in this case; and for the other reasons set forth hereinabove, it is respectfully submitted that this Petition for Writ of Certiorari should be granted.

Respectfully Submitted

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APPENDIX

(CAPTION OMITTED)

COMPLAINT

COMES NOW the Plaintiff, ROBERT M. BRAKE, and sues the Defendants, DON SHOEMAKER, and THE MIAMI HERALD PUBLISHING COMPANY, a Florida corporation, and shows unto this Honorable Court as follows:

COUNT I

1. That the Defendant, THE MIAMI HERALD PUBLISHING COMPANY, is a corporation duly organized and authorized to do business under the laws of the State of Florida and has its principal place of business in the City of Miami in Dade County, Florida, and that said Defendant is engaged in the publication of a daily and Sunday newspaper of general circulation, having a circulation in excess of 350,000 copies. The Defendant DON SHOEMAKER is the editor of said newspaper and has final responsibility for the anonymous editorials and editorial cartoons of said newspaper.

2. That from July 31, 1962, to and including February 19, 1964, Plaintiff was a duly elected member of the Board of County Commissioners of Dade County, Florida.

3. That on Sunday, August 26, 1962, Defendants printed an editorial on the front page of the City Edition of The Miami Herald which is defamatory of Plaintiff and injured the reputation of Plaintiff as an individual, an attorney, and as a member of a public body, by stating

and implying that Plaintiff was engaged in conduct which was unlawful or immoral or of doubtful legality or morality and that Plaintiff lacked maturity. Said imputations were particularly harmful to Plaintiff in his capacity as a member of the Bar of the State of Florida in that an attorney obtains clients on the basis of his honesty and integrity and the maturity of his judgment and to impute dishonesty, lack of integrity, or immaturity of judgment to Plaintiff injured Plaintiff in his occupation as a lawyer. A copy of said editorial is attached hereto and made a part hereof as Plaintiff's Exhibit "A".

4. That Defendant acted maliciously, recklessly and in bad faith and for the purpose of causing Plaintiff to suffer embarrassment and financial loss; to force Plaintiff to lose his position as County Commissioner; and to use Plaintiff's said loss as an example to other local political figures of the reprisals which defendants would exact if any of them dared to act in opposition to Defendants' wishes.

5. That Defendant knew that the allegations of said editorial were untrue as to Plaintiff in that on the preceding day, on Saturday, August 25, 1962, Defendant newspaper carried a story by one GEORGE LARDNER, then the Courthouse reporter for Defendant, in which said reporter described a luncheon, attended by said reporter, at which the Resolution complained of in the editorial was discussed and said article shows clearly that Plaintiff did not participate in the drafting of said Resolution and in fact attempted to persuade the author of said Resolution to withdraw it.

6. That Plaintiff had previously enjoyed a good reputation in said community as is evidenced by the editorial endorsement of Plaintiff's candidacy for office by Defendants on Thursday, May 3, 1962, and Tuesday, May 22, 1962. Copies of which are attached hereto as Plaintiff's Exhibit's "B" and "C".

7. That on August 27, 1962, Plaintiff wrote to Defendants demanding a retraction of said libellous statements under the provisions of Florida Statutes Chapter 770. A copy of said letter is attached hereto and made a part hereof as though set forth herein in full as Plaintiffs' Exhibit "D". In spite of said demand, Defendants failed, neglected and refused to print the retraction therein demanded.

8. As a result thereof, Plaintiff has suffered compensatory damages in excess of the jurisdictional amount of this Court and is also entitled to punitive damages.

WHEREFORE, Plaintiff demands judgment for compensatory damages in an amount in excess of the jurisdictional amount of this Court and demands punitive damages in an amount in excess of the jurisdictional amount of this Court, and Plaintiff demands trial by jury.

COUNT II

9. Plaintiff realleges each and every allegation of Paragraphs 1 and 2 of Count I hereinabove.

10. That on August 29, 1962, Defendants published a cartoon depicting Plaintiff and others as small boys attempting to steal a pie from a windowsill. A copy of

said cartoon is attached hereto and made a part hereof as though set forth herein in full as Plaintiff's Exhibit "E".

11. That said cartoon implies that Plaintiff attempted to steal from the people of Dade County, which is defamatory of Plaintiff and injured the reputation of Plaintiff as an individual, an attorney, and as a member of a public body, by implying that Plaintiff was engaged in conduct which was unlawful or immoral or of doubtful legality. Said imputations were particularly harmful to Plaintiff is his capacity as a member of the Bar of the State of Florida, in that an attorney obtains clients on the basis of his honesty and to impute dishonesty to Plaintiff injured Plaintiff in his occupation as a lawyer.

12. That Defendants acted maliciously, recklessly, and in bad faith and for the sole purpose of causing Plaintiff to suffer embarrassment and financial loss and to force Plaintiff to lose his position as County Commissioner; and to use Plaintiff's said loss as an example to other local political figures of the reprisals which Defendants would exact if any of them dared to act in opposition to Defendants' wishes.

13. That Defendants knew that the imputations of said cartoon were untrue as to Plaintiff and said knowledge was reflected in the news reports and columns of Defendants' newspaper on the days immediately preceding the publication of said cartoon.

14. That Plaintiff wrote to Defendants on September 17, 1962, requesting a retraction of the imputation of said cartoon. A copy of said letter is attached hereto and made a part hereof as though set forth herein in full

as Plaintiff's Exhibit "F". However, Defendant failed, neglected and refused to publish the retraction therein requested.

15. As a result thereof, Plaintiff has suffered compensatory damages in excess of the jurisdictional amount of this Court and is entitled to punitive damages.

WHEREFORE, Plaintiff demands judgment for compensatory damages in an amount in excess of the jurisdictional amount of this Court and demands punitive damages in excess of the jurisdictional amount of this Court, and Plaintiff demands trial by jury.

s/ ROBERT M. BRAKE

[Pictures omitted]

[Other exhibits omitted]

[Caption omitted]

FIRST AMENDMENT TO COUNT III OF COMPLAINT

COMES NOW the Plaintiff ROBERT M. BRAKE, and amends Count III of the above styled Complaint to read as follows:

COUNT III

16. Plaintiff realleges each and every allegation of Paragraphs One and Two of Count I hereinabove.

17. Beginning with the aforesaid editorial of August 26th, 1962 and continuing thereafter the Defendants DON

SHOEMAKER, and THE MIAMI HERALD PUBLISHING COMPANY and later the Defendant FRED SHERMAN, who was appointed to the editorial page staff of said newspaper after August 26th, 1962, acted maliciously, recklessly and in bad faith to bring Plaintiff into public disrepute, scorn and ridicule in both its news and editorials columns for the purpose of causing Plaintiff to suffer embarrassment and financial loss. For example:

(a) In the editorial published on August 29th, 1962, a copy of which was attached to Plaintiff's original Complaint in this cause, Defendants characterize Plaintiff and four other members of the then County Commission as "the romper boys". Through repitition of said term thereafter, Defendants characterized Plaintiff as a member of said group which was called "the romper boys" or simply, "the boys" and from time to time thereafter the Defendants would criticize the actions and voting records of some of the members of said group by characterizing said actions as the actions of "the boys". In this manner Plaintiff was criticized for actions which he did not do. A specific example of this is an editorial in said newspaper on June 6th, 1963, referring to actions of "the boys" at a Commission meeting which occurred while Plaintiff was out of Dade County on his annual short tour of military duty with the United States Air Force. Defendants' courthouse reporter, who was present at said meeting, knew that Plaintiff was not present at said meeting and was not responsible for the actions taken by the other four members of the group characterized as "the boys". A copy of said editorial is attached hereto as Plaintiff's Exhibit "G".

(b) Defendants also used the news columns of said newspaper to blacken Plaintiff's name. For example, Plaintiff reported an unusual offer of a campaign contribution to the vice chairman of the County Commission and to the State's Attorney's office. In reporting the investigation of the Dade County Grand Jury into this matter, Defendants used the news column of the MIAMI HERALD to imply that the Plaintiff was guilty of wrongdoing including the switching of headlines from the early edition of its newspaper on November 13th, 1966 which read "Metro Bribe Case" to a headline reading "Brake Bribe Case" in its later edition despite the fact that the Defendants knew that the Plaintiff was innocent of any wrongdoing.

(c) The actions of Defendants up to and through February 18th, 1964, caused the public to lose confidence in Plaintiff as a County Commissioner and contributed to the early termination of Plaintiff's term as County Commissioner on February 18th, 1964, instead of on June 7th, 1966 when Plaintiff's term would have ended ordinarily, thus causing Plaintiff to lose in excess of $16,000 in salary and allowances.

18. The malice of Defendants to Plaintiff continued after Plaintiff left the Dade County Commission and culminated in the publication of a defamatory editorial written by the Defendant FRED SHERMAN under the supervision of the Defendant DON SHOEMAKER and printed in THE MIAMI HERALD on Tuesday, August 25th, 1964, entitled "Darrey Davis and Mr. Brake". A copy of said editorial is attached hereto and made a part hereof as Plaintiff's Exhibit "H". The circumstances surrounding said editorial are as follows:

(a) During the month of July, 1964, Plaintiff was requested by Edward Sofen, a Professor of Government at the University of Miami, to draft two proposed amendments to the Metropolitan Dade County Charter. The first amendment was to require the Metropolitan Dade County Commission to implement the recommendations of the report of Hunnicut & Associates, a nationally recognized tax assessment consulting firm in St. Petersburg, Florida, concerning improved procedures for the Dade County Tax Assessor's office. The second amendment was to eliminate the office of County Manager and provide that the mayor of Dade County should be the chief executive officer of the county under a so-called "strong Mayor" form of government rather than a "manager-council" form of government. Plaintiff drafted said two amendments together with an initiative petition sheet to be used under the initiative provisions of the Metropolitan Dade County Charter and two instruction sheets for attachment to the Petitions for the use and benefit of persons soliciting signatures on the Petitions. The shorter of the two instruction sheets was used on the first set of Petitions printed and the longer sheet was used on all succeeding Petitions printed. No other instruction sheet or other information was given to those persons who solicited signatures on said Petitions. A copy of said Petition with the instruction sheets is attached hereto and made a part hereof as Plaintiff's Exhibit "I".

(b) Thereafter and prior to the County Commission meeting of August 4th, 1964, Plaintiff delivered a copy of said Petitions to County Attorney THOMAS BRITTON to pass upon the legal sufficiency thereof. At the meeting of the Dade County Commission on August 4th, 1964, said Petitions were formally presented to the

Commission by Plaintiff and Professor Sofen in the name of a group called "The Committee for Responsible Government" and were approved by the Commission as to form and legal sufficiency. Said Committee had thirty (30) days under the provisions of the Metro Charter within which to gather sufficient signatures on said Petitions to require an election on said proposed amendments.

(c) Beginning with the newspaper articles printed on the day said Petitions were approved, to-wit: August 4th, 1964 in the Miami News, and reports on the local radio and television stations, and continuing through the publication of said defamatory editorial, Plaintiff was consistently identified as one of the leaders, if not the primary leader, of the group sponsoring said Petitions. In the initial article reporting on the Petition movement, which was printed by the Miami Herald on August 5th, 1964, Plaintiff was identified as a leader of the group proposing the amendments in the following language:

> "A campaign to oust the present Metro Commission, abolish the County Manager's job, and set up a strong mayor form of government in Dade was launched Tuesday by a University of Miami professor and an ex-county commissioner.
>
> "Dr. Edward Sofen, the professor, and Attorney Robert Blake, a former commissioner said they will seek 43,000 voters' signatures required to force the Metro Commission to place two proposed charter amendments on the November 3rd ballot . . .

"The second amendment takes up the present tax reassessment issue as a standard to rally around . . ."

In addition, Plaintiff was identified in said article as the draftsman of the amendments in the following language:

"Brake, who is also counsel for the Dade League of Muncipalities, drafted the amendments and was listed as a supporter."

A copy of said article is attached hereto and made a part hereof as Plaintiff's Exhibit "J".

(d) Thereafter, all articles printed in the MIAMI HERALD concerning said Petitions identified Plaintiff as the leader of the group circulating said Petitions and characterized Plaintiff by adjectives intended to be derogatory. Copies of the articles appearing in THE MIAMI HERALD on August 7th, 1964, and August 18th, 1964, are attached hereto as Plaintiff's Exhibits "K", and "M" respectively.

(e) To further connect Plaintiff with the group circulating the Petitions THE MIAMI HERALD on August 6th, 1964, printed an editorial entitled "Mr. Brake and Others" in which Plaintiff was singled out as being "behind this latest effort to knock out Metropolitan Government in Dade County" and was characterized as a "rabble rouser". On the contrary, Professor Sofen was characterized as merely "lending his support" to the charter amendments when in fact, the amendments were conceived by Professor Edward Sofen and merely drafted by Plaintiff. Said editorial on August 6th, 1964, further ex-

poses Defendants' malice to Plaintiff and anticipates the libelous editorial hereinafter complained of by:

1. Pointing out the connection between Plaintiff as an attorney and state law governing tax assessments, and,

2. By the allegations of Defendants that "... it was the commissioners in 1961 who ran out on their responsibility to assess this county fairly".

and, after identifying Plaintiff as a former commissioner by failing to state that Plaintiff did not begin his term of office as a Metro Commissioner until July 31st, 1962 thus implying that Plaintiff was one of the Commissioners who acted improperly in 1961. A copy of said editorial is attached as Plaintiff's Exhibit "N".

(f) In order to explain the need for the two charter amendments to the public, said committee directed Charles Kimball, a local statistical analyst, to research Dade County's tax roll and compare assessments with actual sales of property. On August 20th, 1964, the Committee called a press conference at Plaintiff's law office and distributed to members of the press, including reporters for THE MIAMI HERALD, copies of a booklet containing such statistical analysis; a press release from Charles Kimball; and a second press release from Plaintiff. All of said documents were critical of the testimony of Dade County's appointed officials in the case of DuPont Plaza et al vs. McNayr, and emphasized the desirability of the Committee's Petitions which would call for the election of the County Manager thus making the manager

responsible to the people for any false testimony which he might give. A copy of said booklet is attached as Exhibit "O", Kimball's press release as Exhibit "P", and Plaintiff's press release as Exhibit "Q".

(g) Thereafter, on August 21st, 1964, the Defendant THE MIAMI HERALD published a newspaper article in which Plaintiff was further identified as a "backer of two Metro Charter Amendments" and the statements of Plaintiff, Charles Kimball, and various county officials were reported. A copy of said article is attached hereto as Plaintiff's Exhibit "R".

(h) Thereafter, on August 22nd, 1964, the Defendant THE MIAMI HERALD printed a second article reporting the reply of former county attorney, Darrey Davis, to the statements reported by the Defendant THE MIAMI HERALD in its aforesaid article of August 21st. In said article Plaintiff was further identified as "leading a campaign to place two proposed Metro Charter Amendments on the November 3rd ballot". A copy of said article is attached hereto as Plaintiff's Exhibit "S".

(i) Thereafter, on Tuesday, August 25th, 1964 the Defendants printed in THE MIAMI HERALD the defamatory editorial complained of which was written by the Defendant FRED SHERMAN under the supervision of the Defendant DON SHOEMAKER entitled "Darrey Davis and Mr. Brake". A copy of said editorial is attached hereto and made a part hereof as Plaintiff's Exhibit "H". Said editorial was libelous in the following regard:

A. Said editorial impugned Plaintiff's ability and integrity as a lawyer by stating that he "should know

the law" thus implying that although Plaintiff was a lawyer he did not know the law; and by stating that the "anti-Metro Petitions now being circulated promise that the state law on the assessment of real estate will not be enforced. Could anything be more dishonest?" thus implying that Plaintiff, as the lawyer draftsman of the Amendments and the leader of the group circulating the Petitions, was giving false legal information to the general public. Said statement was false, in that nothing in said Petitions, or any statement made by or under the control of Plaintiff, alleged that state law would not be obeyed.

B. Said editorial impugned Plaintiff's integrity as a public office holder by outlining the difficulty faced by Dade County in connection with its tax roll since 1961 and then stating: "Where was Bob Brake and what was he doing as a Metro Commissioner to make Dade County comply with the Florida assessment law?" Said statements implied that Plaintiff did nothing as a County Commissioner to bring about a fair, equitable and lawful tax assessment roll, when in truth Plaintiff supported every effort to obtain a fair tax roll for Dade County during his eighteen (18) months as a County Commissioner, including, but not limited to the employment of Hunnicutt & Associates in November, 1963 to review the procedures of the Tax Assessor's office; and a protest of assessment procedures on July 22nd, and July 23rd, 1963, during the hearings of the Dade County Board of Equalization (which protests were never reported in Defendants' newspaper despite the fact that Defendants' reporters were present).

C. Said statements were made with malice by Defendants in that the Defendants FRED SHERMAN

and DON SHOEMAKER had received copies of said Petitions and had read the same prior to writing and printing said editorial.

D. As an alternative or additional ground of malice Plaintiff says that said statements were made with a reckless disregard of truth in that the authors of said defamation, to-wit, the Defendants DON SHOEMAKER and FRED SHERMAN, failed to contact Plaintiff or any of the principals of the Committee supporting said Petitions to determine the content and intended effect of said Petitions; did not read the original press release of August 20th, 1964, given to Defendant newspaper by Plaintiff; did not compare the Hunnicutt report with the Petitions despite the fact that in the newspaper story of August 7th, 1964, attached hereto as Plaintiff's Exhibit "K", THE MIAMI HERALD printed Plaintiff's statement that the tax assessment amendment embodied the recommendations of the Hunnicutt report; and did not consult Plaintiff or its own reporters or the public records of the minutes of the Board of County Commissioners of Dade County, Florida to determine Plaintiff's voting record on tax assessment questions.

E. On April 5th, 1967 the Defendant THE MIAMI HERALD printed a news article stating that the recommendations of the Hunnicutt report including but not limited to the preparation of the personal property manual had been implemented by Dade County which is presently using such a manual.

19. In publishing said defamatory matter Defendants acted maliciously, recklessly and in bad faith and for the purpose of causing embarrassment and humiliation

to Plaintiff in his capacity as a lawyer and private citizen of Dade County, Florida, and caused Plaintiff to suffer financial loss and mental suffering despite the fact that Plaintiff had previously enjoyed a good reputation in Dade County as is evidenced by the editorial endorsement of Plaintiff's candidacy for office by Defendants on Thursday, May 3rd, 1962 and Tuesday, May 22nd, 1962, copies of which are attached to Plaintiff's original complaint as Exhibits "B" and "C".

20. Thereafter, from time to time, Defendants continued their policy of maliciously, recklessly and in bad faith attempting to cause Plaintiff to suffer embarrassment and humiliation through the printing of irresponsible news and editorial articles concerning Plaintiff, including, but not limited to, conspiciously announcing that it had "no recommendation" in the elections for State Legislature, Group 18, in the General Elections of November, 1966, despite the fact that Plaintiff's only opponent was a Republican having no governmental experience or background whatsoever; and including but not limited to the actions of Defendants in inducing a candidate to run against Plaintiff in the reapportionment election of February 28th, 1967, on the promise of editorial support provided that the candidate qualified against Plaintiff.

21. On August 25th, 1964, Plaintiff wrote to Defendant demanding a retraction of the libelous statements of the editorial of August 21st, 1964, under the provisions of Florida Statutes Chapter 770. A copy of said letter is attached hereto and made a part hereof as though set forth herein in full as Plaintiff's Exhibit "T". In addition Plaintiff, together with two other members of the Committee, personally visited the Defendant FRED SHER-

MAN and pointed out to him the manner in which said editorial was erroneous and requested a retraction of the libelous statements. In spite of said demands, Defendants have failed, neglected and refused to print the retraction so demanded or the true facts of the matters alleged in said editorial.

22. As a result thereof Plaintiff has suffered financial loss, and mental pain and suffering in an amount in excess of the jurisdictional amount of this Court.

WHEREFORE Plaintiff demands judgment for compensatory damages and punitive damages in excess of the jurisdictional amount of this Court and Plaintiff demands trial by jury.

s/ ROBERT M. BRAKE
1830 Ponce de Leon Boulevard
Coral Gables, Florida

[Jurat and Certificate of Mailing Omitted]

Exhibit H:
Darrey Davis And Mister Brake

THE ONE MAN who always played it straight and honest with the people he was working for is now under attack by Robert Brake and his gang of Metro-wreckers.

Darrey Davis, who served Dade as its county attorney seven years and pulled it through countless political assaults, is now accused of mishandling the Dupont Plaza Hotel suit that led to the court-ordered doubling of the tax roll. It is a credit to the mild manner and even temper of Mr. Davis that he only called the Brake Gang "political

opportunists." He could have used sharper language with good cause.

Bob Brake is a lawyer and he should know the law. Instead of complaining that Darrey Davis didn't oppose the Dupont Plaza suit with enough "vigor," Mr. Brake should have acknowledged the facts.

When Bob Brake went on the Metro commission in 1962, the county was on notice to obey the Florida law on assessment. The court had been promised we would obey that law. But two more years were to go by while County Attorney Davis fought tax suits in the courts and pleaded with his own commissioners to achieve a tax roll that would satisfy the law. Over and over again he warned that he could not continue to hold off law suits filed by property owners who were carrying more than their fair share of the county tax load.

As Mr. Davis said this past weekend, "By reason of the 103 law suits attacking the county's tax rolls since 1961, it was apparent to everyone that someday the roll would be successfully challenged if it were not made to comply with the requirements of the Constitution and the statutes." If this were the first time Mr. Davis had said this, you would accuse him of most anything. But the county attorney said this back in 1961 and he kept repeating it. Where was Bob Brake and what was he doing as a Metro commissioner to make Dade County comply with the Florida assessment law?

The court-ordered assessment crisis has given hope to an irresponsible minority attempting to overturn the first stable commission government Dade has had since

Metro was created. It is a sign of that irresponsibility when the reputation of Darrey Davis is attacked.

We refuse to believe that Metro can be wrecked on the issue of fair taxation ordered under Florida law.

The anti-Metro petitions now being circulated promise that the state law on the assessment of real estate will not be enforced.

Could anything be more dishonest?

[All other exhibits omitted]
[Caption Omitted]

ORDER GRANTING MOTION TO DISMISS AND DENYING MOTION FOR SUMMARY JUDGMENT AND MOTION FOR PARTIAL SUMMARY JUDGMENT

This cause came on to be heard, after notice to all parties, on Motion to Dismiss and Motion for Summary Judgment filed by the defendants herein and a Motion for Partial Summary Judgment filed by the plaintiff herein. The court heard argument of counsel. The court is of the opinion that the plaintiff was a public official at the time of the occurrence and publication of the matters referred to in Counts I and II of the Complaint and a public figure at the time of the occurrence and publication of the matters referred to in First Amendment to Count III of the Complaint. Upon consideration, it is,

ORDERED AND ADJUDGED:

1. That Motion for Summary Judgment filed by the defendants and Motion for Partial Summary Judgment filed by the plaintiff are hereby denied.

2. That Motion to Dismiss filed by the defendants is hereby granted and the Complaint, the First Amendment to Count III of Complaint and this cause are hereby dismissed.

DONE AND ORDERED in Chambers at Miami, Dade County, Florida, this 14th day of July, 1967.

HARVIE S. DuVal
Circuit Judge

[Docketed July 14th]
[Caption Omitted]

MOTION TO DISMISS

DON SHOEMAKER, THE MIAMI HERALD PUBLISHING COMPANY, a corporation, and FRED SHERMAN, defendants, move this Court for an Order dismissing the Complaint and First Amendment to Count III of Complaint for failure to state a cause of action in that:

1. It appears from the Complaint that this Court knows judicially that plaintiff was a public official or a public figure at the time of the publications complained of, and the Complaint and First Amendment to Count III of Complaint fail to allege that the defendants published the matters complained of with actual malice.

2. The Complaint and First Amendment to Count III of Complaint fail to allege or, alternatively, it does not appear from the publications themselves that the matters complained of or any of them referred to the plaintiff.

3. It affirmatively appears from First Amendment to Count III of Complaint that the editorial complained of is true or substantially true.

4. Plaintiff has failed to comply with the requirements of Chapter 770, Florida Statutes.

5. The publication complained of in the Complaint and First Amendment to Count III of Amended Complaint are not libelous at all, and, even if libelous, are not libelous per se, and plaintiff has failed to allege any special damages.

6. The Complaint and First Amendment to Count III of Amended Complaint fail to state with the required particularity the facts and circumstances upon which to base a claim for punitive damages.

SCOTT McCARTHY STEEL HECTOR & DAVIS
Attorneys for Defendants
14th Floor First National Bank Bldg.
Miami, Florida 33131
By: DWIGHT SULLIVAN

[Certificate of Mailing omitted]

IN THE DISTRICT COURT OF APPEAL OF FLORIDA

THIRD DISTRICT JANUARY TERM, A.D. 1968

CASE NO. 67-661

ROBERT M. BRAKE,

Appellant,

vs.

DON SHOEMAKER, THE MIAMI HERALD PUBLISHING COMPANY, a Florida corporation, and FRED SHERMAN,

Appellees.

Opinion filed March 19, 1968.

An Appeal from the Circuit Court for Dade County, Harvie S. DuVal, Judge.

Robert M. Brake, for appellant.

Scott, McCarthy, Steel, Hector & Davis and Dwight Sullivan, for appellees.

Before CHARLES CARROLL, C.J., and HENDRY and SWANN, J.J.

PER CURIAM.

In this action for libel the trial court first denied a motion of defendants to dismiss the complaint for failure to state a cause of action. Thereafter the defendants answered and moved for summary judgment, and the plaintiff moved for summary judgment as to liability. These motions were supported and opposed respectively by evidentiary matter. After hearing but prior to a ruling thereon the pleadings were amended, and defendants renewed their motion to dismiss. Thereupon the trial court

entered the order from which the plaintiff now appeals, denying the motions for summary judgment, granting the defendants' motion to dismiss for failure to state a cause of action and dismissing the cause. On consideration of the record and briefs, we affirm on authority of New York Times Co. v. Sullivan, 376 U.S. 254, 84 S.Ct. 710, 11 L.Ed.2d 686. See also Curtis Publishing Company v. Butts, ... U.S. ....., 18 L.Ed.2d 1094, 87 S.Ct. .....

IN THE SUPREME COURT OF FLORIDA JANUARY TERM, A.D. 1968 MONDAY, JULY 8, 1968

CASE NO. 37,419

DISTRICT COURT OF APPEAL, THIRD DISTRICT

ROBERT M. BRAKE,

Petitioner,

DON SHOEMAKER, ET AL.,

Respondents.

This cause having heretofore been submitted to the Court on Petition for Writ of Certiorari, jurisdictional briefs and portions of the record deemed necessary to reflect jurisdiction under Florida Appellate Rule 4.5 c (6), and it appearing to the Court that it is without jurisdiction, it is ordered that the Petition for Writ of Certiorari be and the same is hereby denied.